

# FEDERAL PROTECTION, PATERNALISM, AND THE VIRTUALLY FORGOTTEN PROHIBITION OF VOLUNTARY PEONAGE

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*The Peonage Abolition Act of 1867 abolished voluntary as well as involuntary servitude. Congress did this in sweeping terms, based on the Enforcement Clause of the Thirteenth Amendment, but Congress explicitly extended protections beyond those proclaimed in Section 1 of that Amendment. The historical context makes it clear that the men of the Thirty-Ninth Congress believed Congress had broad power to protect free labor on a national basis. The breadth of these new protections would, if necessary, prevail over either states' rights or private contractual claims. The statute's virtually unchanged current codification in 42 U.S.C. § 1994 is generally overlooked, yet it could provide civil remedies for a broad field of coercive employment situations. Resuscitating the 1867 Act might avoid some of the difficulties encountered in recent federal prosecutions for human trafficking, for example, as well as in civil efforts to protect vulnerable workers.*

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## INTRODUCTION

[U]nder the constitutional amendment Congress is bound to see that freedom is in fact secured to every person throughout the land; he must be fully protected in all his rights of person and of property; and any legislation or any public sentiment

which deprives any human being in the land of those great rights of liberty will be in defiance of the Constitution, and if the States and local authorities, by legislation or otherwise, deny these rights, it is incumbent on us to see that they are secured.<sup>1</sup>

We have been blessed with a recent outpouring of excellent scholarship about the Thirteenth Amendment.<sup>2</sup> That Amendment's guarantee of universal freedom is no longer nearly overlooked, nor is it still viewed almost exclusively as a halfway house en route to the Fourteenth Amendment.<sup>3</sup> Impressive new work illuminates the importance of distinguishing between concepts of freedom of contract and freedom of labor,<sup>4</sup> for example, and scholars have convincingly emphasized the importance of Congress's broad enforcement power to reach private actions through Section 2 of the Thirteenth Amendment.

Important recent books, such as those by Risa Goluboff, Alexander Tsesis, and Michael Vorenberg, have helped to underscore the rapid changes in the evolution of the language of the Amendment and its use and abuse in the decades that followed its enactment.<sup>5</sup> Despite the strained and, at times, appalling recent judicial interpretations of the vestiges of the 1866 Civil Rights Act that remain on the federal statute

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1. Cong. Globe, 39th Cong., 1st Sess. 77 (1865) (statement of Sen. Lyman Trumbull).

2. Professor Alexander Tsesis has been at the center of several important symposia concerning the Thirteenth Amendment and its implications, including this one. See Symposium: Constitutional Redemption & Constitutional Faith, 71 Md. L. Rev. 953 (2012); Thirteenth Amendment Symposium, 38 U. Tol. L. Rev. 791 (2007). A symposium jointly sponsored by the University of Chicago and Loyola University, Chicago in 2009 produced *The Promises of Liberty: The History and Contemporary Relevance of the Thirteenth Amendment* (Alexander Tsesis ed., 2010) [hereinafter *The Promises of Liberty*].

3. See, e.g., Michael Vorenberg, *Citizenship and the Thirteenth Amendment: Understanding the Deafening Silence*, in *The Promises of Liberty*, supra note 2, at 58, 59 (discussing scholarship analyzing Fourteenth Amendment in light of Thirteenth Amendment).

4. See, e.g., James Gray Pope, *Contract, Race, and Freedom of Labor in the Constitutional Law of "Involuntary Servitude"*, 119 Yale L.J. 1474, 1479 (2010) (emphasizing Thirteenth Amendment protection developed in *Pollock v. Williams*, of workers' "power below" to counter "a harsh overlordship or unwholesome conditions of work" (quoting 322 U.S. 4, 18 (1944))).

5. See generally Risa L. Goluboff, *The Lost Promise of Civil Rights* (2007) (examining legal history of economic claims as civil rights issues before *Brown v. Board of Education*); Alexander Tsesis, *The Thirteenth Amendment and American Freedom* (2004) (analyzing modern-day relevance of Thirteenth Amendment); Michael Vorenberg, *Final Freedom: The Civil War, the Abolition of Slavery, and the Thirteenth Amendment* (2001) (discussing history of creation of Thirteenth Amendment).

books,<sup>6</sup> legal scholars have never before recognized the importance of that Act's bold guarantees as they now do.<sup>7</sup> We are beginning to heed what great historians have been pointing out for decades. More than twenty years ago, for example, Eric Foner explained that the 1866 Civil Rights Act

embodied a profound change in federal-state relations and reflected how ideas once considered Radical had been adopted by the [Republican] party's mainstream. . . . Reflecting the conviction, born of the Civil War, that the federal government possessed the authority to define and protect citizens' rights, the bill represented a striking departure in American jurisprudence.<sup>8</sup>

Nonetheless, even the best and most careful recent legal scholarship does not come to grips with the enormity and the fluidity of the crisis the Thirty-Ninth Congress faced and the statutory changes it wrought in response. Nor has adequate attention been paid to the broad scope of the federal power that Congress believed it possessed and should use on the basis of the Thirteenth Amendment. In particular, it has not been sufficiently noticed how extensively the actions of the Thirty-Ninth Congress during its final session in early 1867 changed federalism, thereby underscoring the extent of subsequent judicial interposition regarding state action and states' rights claims. If anything, however, the egregiously restrictive doctrinal errors of late nineteenth-century judges have been compounded in recent years.

The specific focus of this Essay is on the Peonage Abolition Act of 1867.<sup>9</sup> It argues that the Thirty-Ninth Congress, in its effort to abolish all

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6. See, e.g., Aviam Soifer, *Protecting Full and Equal Rights: The Floor and More*, in *The Promises of Liberty*, supra note 2, at 196 [hereinafter Soifer, *Full and Equal Rights*] (discussing historical and recent narrow treatment of federal statutory protections for core civil rights adopted after the Civil War).

7. Some in legal academia, including the author of this Essay, have been poking at the issue of the breadth and significance of the 1866 Civil Rights Act for decades, but William Wiecek has been a leader in this quest throughout his distinguished career. Therefore it is worthy of particular note that Wiecek recently declared, "The 1866 Civil Rights Act, enacted under Congress's Thirteenth Amendment authority to end the incidents of slavery and involuntary servitude, is the key to understanding the meaning of freedom, equality, and civil status after abolition." William M. Wiecek, *Emancipation and Civic Status: The American Experience, 1865–1915*, in *The Promises of Liberty*, supra note 2, at 78, 86.

8. Eric Foner, *Reconstruction: America's Unfinished Revolution, 1863–1877*, at 244–45 (1988) [hereinafter Foner, *Reconstruction*]. See generally Aviam Soifer, *Protecting Civil Rights: A Critique of Raoul Berger's History*, 54 N.Y.U. L. Rev. 651 (1979) [hereinafter Soifer, *Protecting Civil Rights*] (critically reviewing Raoul Berger, *Government by Judiciary: The Transformation of the Fourteenth Amendment* (1977) [hereinafter Berger, *Government by Judiciary*]); Aviam Soifer, *Status, Contract, and Promises Unkept*, 96 Yale L.J. 1916 (1987) [hereinafter Soifer, *Promises Unkept*] (discussing complexity of free choice in context of slavery and its aftermath).

9. Peonage Abolition Act, ch. 187, 14 Stat. 546 (1867) (codified at 42 U.S.C. § 1994).

the vestiges of slavery including any forms of peonage throughout the United States and all federal territory, explicitly swept beyond the freedoms guaranteed by Section 1 of the newly ratified Thirteenth Amendment. Congress clearly believed that its enforcement power, as provided to it by Section 2 of the Amendment, constituted the basis for legislation not only to prohibit numerous forms of involuntary peonage but also to forbid "*voluntary* peonage"—even though Section 1 of the Thirteenth Amendment had declared simply that "[n]either slavery or *involuntary servitude* . . . shall exist within the United States, or any place subject to their jurisdiction."<sup>10</sup>

The historical context makes it abundantly clear that this broad antipeonage statute, enacted on the very day in March 1867 that Congress voted to divide the South into five districts under military rule,<sup>11</sup> undercuts the idea of abiding concern for state sovereignty and states' rights in the Thirty-Ninth Congress. Congress sought to stamp out not only vestiges of slavery but also all forms of peonage, no matter what might be allowed by state laws or by state failures to act. This Essay concludes by briefly discussing a few of the knotty issues surrounding the very concept of voluntary peonage. In a sense, the Essay moves from what at first might seem an anomalous statutory text to its context, and then, briefly, to policy considerations. It never claims, however, that any of these approaches affords a singular conceptual path for lawyers, judges, and citizens to follow. Rather it is in accord with the view that "[t]he past has a vote, but it does not have a veto."<sup>12</sup> It also argues, however, that the past ought not to be jettisoned or entirely forgotten.

In Part I, this Essay examines the text and the historical and political context of the Peonage Abolition Act of 1867. It explores the theme of a federal duty to afford protection, not only to all citizens, but also to every person within the United States and its territories. In particular, it questions received wisdom about both the state action requirement and the narrow interpretation of Congress's expansive powers under the Enforcement Clauses of the post-Civil War Amendments. Finally, Part I

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10. U.S. Const. amend. XIII, § 1 (emphasis added). The words omitted contain the exception "except as a punishment for crime whereof the party shall have been duly convicted." *Id.* It is striking that the final phrase of Section 1 still refers to the United States in the plural, though the Civil War itself had already done much to forge a unitary national entity and to make the United States singular.

11. Government of Rebel States, ch. 152, 14 Stat. 428 (1867).

12. Hasia R. Diner, *The Jews of the United States, 1654 to 2000*, at 254 (2004). Diner quotes Rabbi Mordecai Kaplan, founder of the Reconstructionist movement within Judaism, who claimed that "*halakha* [Jewish law] should have a vote, but not a veto." This epigram soon transformed into "the past should have a vote, but not a veto," representing a central concept of his movement. See David Ellenson, Kaplan, Mordecai, in *Concise Routledge Encyclopedia of Philosophy* 433, 433 (2010) (giving overview of Kaplan's contributions). See generally Mel Scult, *Judaism Faces the Twentieth Century: A Biography of Mordecai M. Kaplan* (1993) (recounting Rabbi Kaplan's life and works).

discusses the broad dimensions of the added protections enacted by the Thirty-Ninth Congress.

Part II uses biblical stories as well as history and recent judicial decisions to suggest the importance, and the complexity, of the concept of voluntary peonage. It wrestles with the question of if, and when, paternalism may be acceptable, particularly to protect those most vulnerable and most susceptible to making “free choices” that are not truly free. It also briefly points out the unrealized promise of the ban on voluntary peonage that is still on the books, virtually unchanged since 1867.

## I. THE PEONAGE ABOLITION ACT OF 1867: CHANGING CONTEXT AND TEXT

### A. *Some Background*

President Andrew Johnson’s March 27 veto of the 1866 Civil Rights Act—and his remarkably provocative veto message—triggered the first congressional override of any presidential veto of a major bill in the nation’s history.<sup>13</sup> Johnson’s veto of the Civil Rights Act closely followed his veto of the Freedmen’s Bureau Bill, which had shocked Moderate Republicans such as Senator Lyman Trumbull of Illinois, who believed he had assurances that the President would sign the bill to assist and protect the newly freed slaves.<sup>14</sup>

Just two days after his earlier Freedmen’s Bureau Bill veto in February, Johnson added insult to injury during his rambling Washington’s Birthday address to a crowd of well-wishers. In his hour-long harangue, Johnson referred to himself over 200 times, and he identified congressional leaders Thaddeus Stevens and Charles Sumner, along with antislavery activist Wendell Philips, as men just as treasonous as the leaders of the Confederacy.<sup>15</sup> Johnson’s speech “stunned Northern opinion,” and his veto of the Civil Rights Act that soon followed “made Radical leadership the only alternative to congressional surrender.”<sup>16</sup>

The 1866 Civil Rights Act that was passed over Johnson’s veto in early April granted broad national citizenship and protected a vital list of rights.<sup>17</sup> Particularly significant, albeit generally overlooked, was the Act’s

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13. W.R. Brock, *An American Crisis: Congress and Reconstruction 1865–1867*, at 113–14 (1963). Brock describes the dilemma moderate Republicans began to realize they faced. They had a President they distrusted, who was apparently reviving the dogmatic states’ rights theory that many believed had caused the Civil War, on one side, and Radicals urging the reconstruction of Southern society on the other. *Id.* at 116.

14. *Id.* at 104–06; Foner, *Reconstruction*, *supra* note 8, at 247.

15. Eric L. McKittrick, *Andrew Johnson and Reconstruction* 292–95 (1960); see also Brock, *supra* note 13, at 110–11 (discussing speech); Foner, *Reconstruction*, *supra* note 8, at 249 (same).

16. Brock, *supra* note 13, at 111, 121.

17. Section 1 of the Act reads,

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all persons born in the United States and not subject to*

guarantee of "full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens."<sup>18</sup> The author of this Essay has argued elsewhere that this phrase sought to protect rights more substantially and more actively than simply to command that everyone be treated equally.<sup>19</sup> Indeed, the "full" aspect of "full and equal" might well be read as a statutory precursor to the constitutional guarantee of "protection" in the Fourteenth Amendment.

In the ongoing moral and legal struggle to determine what it might mean to be "equal," Americans have virtually forgotten Section 1's guarantee of "protection." Yet the national duty to protect the newly freed slaves emerged overwhelmingly as the central theme for Moderate Republicans, as well as for their Radical Republican colleagues, during the debate leading up to the passage of the 1866 Civil Rights Act over Johnson's veto.<sup>20</sup> Furthermore, the breadth of rights guaranteed to all citizens of the United States by the 1866 Civil Rights Act—an act that Congress passed only a few months before the same men approved the text of what became the Fourteenth Amendment—illuminates the core assumptions that the Thirty-Ninth Congress made about the expansive reach of the freedoms announced by the Thirteenth Amendment as well as the broad congressional authority it granted.<sup>21</sup>

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any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding.

Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27, 27 (codified as amended at 42 U.S.C. §§ 1981, 1982).

18. *Id.*

19. Soifer, *Full and Equal Rights*, *supra* note 6, at 211–12 ("The 'full' element of 'full and equal' suggests that to treat everyone the same was neither the exclusive nor even the main goal of the sweeping civil rights guarantee enacted by Congress."). Senator Nye of Nevada may have described the guarantee most succinctly when he embraced Congress's duty to afford "equalized protection under equalized laws." Cong. Globe, 39th Cong., 1st Sess. 1074 (1866) (statement of Sen. James Nye).

20. See, e.g., Soifer, *Protecting Civil Rights*, *supra* note 8, at 671–90.

21. Civil Rights Act § 1. The only exceptions to the broad coverage of Section 1 were for those "subject to any foreign power" and for "Indians not taxed." *Id.* The sweeping scope of the Act's citizenship declaration, as well as the vast range of the rights it enumerated and sought to protect with civil, criminal, and removal power in the federal courts, illustrates how expansive was the power that the men of the Thirty-Ninth Congress believed they had been afforded by the Thirteenth Amendment—which many of them had voted for as members of the Thirty-Eighth Congress.

As if to underscore these broad guarantees, a series of events in early 1866 exacerbated the irreparable rupture between President Johnson and Congress. These events provide the crucial backdrop to the process of drafting the Fourteenth Amendment, undertaken initially by the Joint Committee of Fifteen, which was established as the Thirty-Ninth Congress convened.<sup>22</sup> The temptation to pick apart the words of the Fourteenth Amendment in a quest for a particular end often leads to "law office history" at its worst, relying on selective quotation and ignoring context entirely.<sup>23</sup> Ironically, however, if one were to heed the context in which the Fourteenth Amendment was drafted and sent to the states, it would be virtually impossible to find effective support for the "state action" doctrine during a period when the need for federal protection was clear and the status of the former states that composed the Confederacy was entirely in flux. In early 1866, Congress was awash in reports about formal discrimination rampant within the new Black Codes adopted by the Southern states.<sup>24</sup> In addition, however, the Joint Committee of Fifteen gathered voluminous searing testimony about pri-

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22. The Joint Committee on Reconstruction, consisting of six Senators and nine Representatives, was chaired by Senator William Pitt Fessenden, a Moderate Republican from Maine, and by Representative Thaddeus Stevens, leader of the Radical Republicans from Pennsylvania. It was established to investigate conditions in the South and to report on whether the Southern states were entitled to representation. Michael Les Benedict, *A Compromise of Principle: Congressional Republicans and Reconstruction 1863–1869*, at 140–45 (1974).

23. "Law office history" is the tendency to pull words out of context for the sake of advocacy. See Howard Jay Graham, *The Fourteenth Amendment and School Segregation*, 3 *Buff. L. Rev.* 1, 7 (1953) ("Facts are being determined and treated in isolation . . . and virtually out of their contexts. Law office history . . . of this type could go on forever to no clear result . . . . [E]ven if applied evenhandedly this method is open to serious objection."); Stephen A. Siegel, *How Many Critiques Must Historians Write?*, 45 *Tulsa L. Rev.* 823, 823 (2010) ("Historians coined the epithet 'law-office history' over a half-century ago to describe the way Supreme Court Justices distort the historical record to provide support for positions they take on constitutional controversies."). Eric Foner illustrates this tendency with the "influential examples" of Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding*, 2 *Stan. L. Rev.* 5 (1949) (advocating limited interpretation of Fourteenth Amendment) and Raoul Berger, *Government By Judiciary*, *supra* note 8 (same). Foner, *Reconstruction*, *supra* note 8, at 257 n.53; see also Soifer, *Protecting Civil Rights*, *supra* note 8 (challenging Berger's scholarship). But cf. Raoul Berger, *Soifer to the Rescue of History*, 32 *S.C. L. Rev.* 427 (1981) (attempting to rebut the author's claims). See generally Robert J. Kaczorowski, *Searching for the Intent of the Framers of the Fourteenth Amendment*, 5 *Conn. L. Rev.* 368 (1977) (surveying of attempts to interpret original intent of framers of Fourteenth Amendment).

24. See, e.g., Jacobus tenBroek, *Equal Under Law* 180–81 (1965); see also Cong. Globe, 39th Cong., 1st Sess. 340 (1866) (statement of Sen. James F. Wilson) ("[B]ut wherever the Freedmen's Bureau does not reach, where its agents are not to be found, there you will find injustice and cruelty, and whippings and scourgings and murders that darken the continent. No man can deny this."); Leon F. Litwack, *Been in the Storm So Long: The Aftermath of Slavery* 366–71 (1979) ("Too many in the North, the [Black] Codes smacked of the old bondage.").

vate depredations that freedpersons and their supporters encountered throughout the South.<sup>25</sup>

It is not surprising that there were over seventy proposed drafts for a Fourteenth Amendment by early 1866.<sup>26</sup> For example, Senator William M. Stewart of Nevada introduced a compromise proposal on behalf of the Moderate Republicans that would have exchanged universal amnesty for Southerners for an amendment that read, "All discriminations among the people because of race, color, or previous condition of servitude, either in civil rights or the right of suffrage, are prohibited . . . ."<sup>27</sup> And, as Eric Foner pointed out in his summary of the tangled legislative history of the Fourteenth Amendment, the draft amendment proposed by Ohio Congressman John A. Bingham "granting Congress the authority to secure the 'privileges and immunities' and 'equal protection of life, liberty, and property' of all citizens" was tabled because "[m]ost Republicans believed Congress already possessed this power."<sup>28</sup>

The duty to protect all those who had been made national citizens by Section 1 of the 1866 Civil Rights Act became the core concern of the Thirty-Ninth Congress. President Johnson's multiple blunders had only begun with his drunken performance at his inauguration as Vice President in March 1865. Johnson's enthusiasm for returning to the federalism of the pre-Civil War era and for readmission of the Southern states as quickly as possible made it seem necessary for Congress to take the lead.<sup>29</sup> Johnson's blatant racism further fed Congress's desire for a new federal order.<sup>30</sup>

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25. Report of the Alleged Outrages in the Southern States by the Select Committee of the Senate, S. Rep. No. 42-1 (1871); see also Foner, *Reconstruction*, supra note 8 at 224-27 (highlighting "white South's inability to adjust to the end of slavery, the widespread mistreatment of blacks, Unionists, and Northerners, and a pervasive spirit of disloyalty"). But see J. Michael Quill, *Prelude to the Radicals: The North and Reconstruction During 1865*, at 127-28 (1980) (quoting extensive reports of outrages but suggesting reports had tendency to exaggerate).

26. Foner, *Reconstruction*, supra note 8, at 251-52.

27. S.J. Res. 62, Cong. Globe, 39th Cong., 1st Sess. 1906 (1866). For a brief discussion of Alexander Bickel's reading of this proposal, see Soifer, *Protecting Civil Rights*, supra note 8, at 685 n.169. For an explanation of how Johnson's veto of the Civil Rights Act doomed Stewart's proposal, see Brock, supra note 13, at 117-18.

28. Foner, *Reconstruction*, supra note 8, at 253; see Rebecca E. Zietlow, *The Rights of Citizenship: Two Framers, Two Amendments*, 11 U. Pa. J. Const. L. 1269, 1281-82 (2009) (noting "the Thirty-Eighth Congress . . . thought their enforcement power was broad indeed, and that it extended to proclaiming freed slaves as citizens and extending to them the rights of citizenship"); see also tenBroek, supra note 24, at 205-08 ("Both ideas of a constitutional guarantee and a grant of power to Congress prevailed in the end.").

29. See Litwack, supra note 24, at 529 ("In upholding the principles of white supremacy, in expediting the pardon of ex-Confederate leaders, in seeking to restore political and economic power to the old ruling class, President Johnson would act all too decisively.").

30. See, e.g., id. at 530 (reporting after meeting with Frederick Douglass, Johnson reportedly told his secretary "I know that damned Douglass; he's just like any nigger, and he



*B. The 1866 Election and the Peonage Abolition Act of 1867*

The summer and fall that followed the battles over President Johnson's vetoes of the Freedmen's Bureau Bill and the Civil Rights Act of 1866 produced a stunning political disaster for Johnson. It should not be forgotten, however, that over the same period blacks in the South suffered much more serious harm. Terrible race riots in Memphis and New Orleans took scores of black lives; these were only the most dramatic among the multiple assaults and blatant deprivations of rights that freedpersons and their allies repeatedly encountered throughout the South.<sup>31</sup> Meanwhile, in the summer of 1866 President Johnson sought to form a new National Union Party, combining Conservative Republicans with sympathetic Democrats. The Philadelphia Convention called to launch this new alliance was a complete bust, however, and internal divisions quickly doomed Johnson's efforts.<sup>32</sup> Nonetheless, Johnson decided to take his own Reconstruction ideas directly to the people.

Johnson's unprecedented "Swing Round the Circle" campaign proved such a debacle that even the President's stalwart supporters were appalled.<sup>33</sup> His ham-handed attempts to utilize patronage similarly backfired. The Republicans won in a national landslide in November, in part because of the political appeal of the Fourteenth Amendment they had

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would sooner cut a white man's throat than not"); see also President Andrew Johnson, Annual Message of the President to Congress (Dec. 3, 1867), in *Foreign Relations of the United States* (1868), at 1, 6 (recording Johnson's remark, in his annual message to Congress, that blacks have "shown less capacity for government than any other race of people" and that "wherever they have been left to their own devices they have shown a constant tendency to relapse into barbarism"); W.E.B. Du Bois, *Black Reconstruction in America* 322 (1935) ("The transubstantiation of Andrew Johnson was complete . . . . Because he could not conceive of Negroes as men, he refused to advocate universal democracy, of which, in his young manhood, he had been a fierce advocate, and made strong alliance with those who would restore slavery under another name."). See generally Annette Gordon-Reed, *Andrew Johnson 2* (Arthur M. Schlesinger, Jr. & Sean Wilentz eds., 2011) (recounting Frederick Douglass's dismayed reaction on meeting Johnson).

31. For accounts of the Memphis and New Orleans race riots of 1866, see, respectively, *Memphis Riot*, *Encyclopedia of the Reconstruction Era* (Richard Zuczek ed., 2006), and John Kendall, *History of New Orleans* 303–14 (1992); see also Litwack, *supra* note 24, at 281. For a catalog of attacks reported in Southern states against freedmen, see generally *Report of the Alleged Outrages in the Southern States by the Select Committee of the Senate, S. Rep. No. 42-1* (1871).

32. See, e.g., Hans L. Trefousse, *Andrew Johnson: A Biography* 255–71 (1989) (describing Johnson's failed efforts to build bipartisan coalition during 1866 National Union Convention).

33. See Foner, *Reconstruction*, *supra* note 8, at 264–65 (noting contention by Senator James R. Doolittle (Republican from Wisconsin), who chaired National Union Convention in Philadelphia in its failed attempt to launch new national political party in 1866, that Johnson's disastrously unpopular speaking tour may have cost Johnson and his allies a million Northern votes).

just promulgated over Johnson's objections.<sup>34</sup> Not surprisingly, in the wake of the terrible Civil War, voters in the victorious North simply could not abide Johnson's plan for unconditional and immediate readmission of the Southern states.

The lame-duck Thirty-Ninth Congress that got down to business in January 1867 thus was well aware that the Congress that would soon succeed them would have a solid majority, easily able to muster the two-thirds votes needed to override Johnson's vetoes.<sup>35</sup> As the Thirty-Ninth Congress reconvened, it was prepared to do battle over black suffrage as well to fight the President over the questions of whether, when, and how to reinstate the Southern states.

Though the Fourteenth Amendment was not yet in place, these veteran members of the Thirty-Ninth Congress were convinced that Section 2 of the Thirteenth Amendment afforded them ample constitutional authority to forbid peonage of any kind. The debate on this issue kicked off on January 3, 1867, the first day of the session, with a troubling report introduced by Senator Charles Sumner of Massachusetts about U.S. Army personnel directly aiding a system of peonage that exploited Mexicans, as well as Indians, captured for the purpose of making them peons in the New Mexico Territory.<sup>36</sup> On the House side, Representative Thaddeus Stevens delivered a blistering speech in which he cried out for protection of "our loyal brethren at the South, whether they be black or white, whether they go there from the North or are natives of the rebel States," who desperately needed Congress to proceed at once to protect them "from the barbarians who are now daily murdering them."<sup>37</sup>

Congress easily adopted the Peonage Abolition Act of 1867<sup>38</sup> on March 2, after debates in both the Senate and the House made it clear

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34. See *id.* at 267 ("[T]he election became a referendum on the Fourteenth Amendment. . . . And the result was a disastrous defeat for the President. . . . [V]oters confirmed the massive Congressional majority Republicans had achieved in 1864.").

35. See *id.* (discussing congressional Republicans' controlling position).

36. Cong. Globe, 39th Cong., 2d Sess. 239-40 (1867). Other items on the Senate agenda that day included land grants for railroads, *id.* at 239, the Tenure of Office Act, *id.* at 241, attempts to control false representations to immigrants that induced them into servitude, *id.* at 247, and a proposed resolution seeking to instruct the Judiciary Committee to seek measures, if any, that could be taken "to prevent the Supreme Court from releasing and discharging the assassins of Mr. Lincoln and the conspirators to release the rebel prisoners at Camp Douglas, in Chicago." *Id.* at 249. This resolution failed to obtain unanimous consent. *Id.*

37. *Id.* at 251. Stevens also asserted that in the United States, "the whole sovereignty rests with the people, and is exercised through their Representatives in Congress assembled." Thus, Stevens declared, "No Government official, from President and Chief Justice down, can do any one act which is not prescribed and directed by legislative power." *Id.* at 252. The Supreme Court's recent decision in *Ex parte Milligan*, 71 U.S. 2 (1866), drew particular ire because Stevens read it to endanger all efforts to use the military to protect freed blacks and loyal unionists. *Id.* at 251.

38. Peonage Abolition Act, ch. 187, 14 Stat. 546, 546 (1867) (codified at 42 U.S.C. § 1994). The Act provided, in relevant part,

that the Act's coverage stretched well beyond protecting former black slaves. It is noteworthy that the language of the Act swept very broadly as it banned "the *voluntary or involuntary service or labor of any persons* as peons, in liquidation of any debt or obligation, or otherwise."<sup>39</sup> The Act thus did not restrict the definition of the peonage; it forbade compelled labor due to "debt." Yet the 1867 Act also recognized that the treatment it sought to prohibit, whether involuntary or voluntary, could be compelled in many different ways. This included "usages"<sup>40</sup> as well as the laws and ordinances now generally considered necessary to supply the "color of law," or state action, that is currently requisite to obtain coverage under most federal civil rights statutes. As in the statutory reference to "custom, or usage" in the Ku Klux Klan Act of 1871,<sup>41</sup> the Thirty-Ninth Congress understood all too well that anonymous nightriders, for example, were often entirely successful in depriving former slaves and their allies of

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The holding of any person to service or labor under the system known as peonage is . . . abolished and forever prohibited in the territory of New Mexico, or in any Territory or State of the United States; and all acts, laws, resolutions, orders, regulations, or usages of the Territory of New Mexico, or of any other Territory or State of the United States, which have heretofore established, maintained, or enforced, or by virtue of which any attempt shall hereafter be made to establish, maintain, or enforce, directly or indirectly, the voluntary or involuntary service or labor of any persons as peons, in liquidation of any debt or obligation, or otherwise . . . are hereby, declared null and void.

Id.

James Gray Pope, Lea S. VanderVelde, and Rebecca E. Zietlow have produced first-rate accounts of the background and implications of antipeonage legislation. See, e.g., Pope, *supra* note 4, at 1482–87 (reviewing legislative origins of "right to quit work" as set forth in Northwest Ordinance of 1787 and Peonage Abolition Act of 1867); Lea VanderVelde, *The Thirteenth Amendment of Our Aspirations*, 38 U. Tol. L. Rev. 855, 857–59 (2007) (discussing five historical uses of Congress's Section 2 enforcement power under Thirteenth Amendment); Rebecca E. Zietlow, *Free at Last! Anti-Subordination and the Thirteenth Amendment*, 90 B.U. L. Rev. 255, 262, 290–92 (2010) (discussing passage of anti-peonage acts during Reconstruction era). See generally Eric Foner, *Free Soil, Free Labor, Free Men: The Ideology of the Republican Party Before the Civil War* 11–18 (1970) [hereinafter Foner, *Free Soil*] (discussing Republican ideal of free labor in mid-nineteenth century); Robert J. Steinfeld, *The Invention of Free Labor: The Employment Relation in English and American Law and Culture, 1350–1870*, at 15–24 (1991) [hereinafter Steinfeld, *Invention of Free Labor*] (discussing longstanding acceptance of indentured servitude before nineteenth century). Eric Foner's book, published more than forty years ago, remains vital to understanding these slippery and yet fundamental matters.

39. Peonage Abolition Act, 14 Stat. at 546 (emphasis added).

40. Id.

41. Ku Klux Klan Act of 1871, ch. 22, 17 Stat. 13, 13 (1871) (codified as amended at 18 U.S.C. § 241 and 42 U.S.C. §§ 1983, 1985(3), 1988).

basic rights—and many times of their lives<sup>42</sup>—without overt involvement by the state or by any state officials whatsoever.<sup>43</sup>

With the Peonage Abolition Act, Congress extended its statutory protections considerably. It directly reached beyond the prohibitions that the text of Section 1 of the Thirteenth Amendment announced explicitly. The Amendment's ban of "slavery" and "involuntary servitude" afforded the constitutional basis for the Thirty-Ninth Congress to add protection against any attempt "to establish, maintain, or enforce, directly or indirectly, the voluntary or involuntary service or labor of any persons as peons."<sup>44</sup> Clearly, the Thirty-Ninth Congress believed it had adequate authority under the Thirteenth Amendment to add "voluntary" peonage to the involuntary peonage that the Amendment's text specifically banned. The Peonage Act's protections even stretched beyond the traditional definition of peonage anchored in debt or obligation; the new statute would also reach obligations "otherwise" imposed.<sup>45</sup> Though effective

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42. See, e.g., Foner, *Reconstruction*, supra note 8, at 425–44 (discussing "counterrevolutionary terror" created by Ku Klux Klan violence in American South in 1860s and 1870s); Allen W. Trelease, *White Terror: The Ku Klux Klan Conspiracy and Southern Reconstruction*, at xvii–xxv, xlii–xlvi (1971).

43. Justice John Harlan's strained reading of the statutory language of 42 U.S.C. § 1983 to interpret "custom and usage" to require acts by government officials in *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 162–69 (1970), demonstrates the kinds of somersaults required to maintain the state action barrier. Rather incredibly, the Court rejected the civil rights claim of a white schoolteacher refused service at a lunch counter in Hattiesburg, Mississippi when she accompanied six black students there because she had not proved the requisite involvement of state officials with store personnel before she was arrested for vagrancy upon leaving the store. *Id.* at 146–47, 169–70.

On the other hand, if *Shelley v. Kraemer* is to be taken seriously, there seems no stopping place once the origin story identifies the arm of the state behind the enforcement of the laws. 334 U.S. 1, 19–20 (1948) (finding state court's enforcement of restrictive covenant constitutes state action). Like turtles in what may be an apocryphal ancient myth, it becomes state action all the way down. Clifford Geertz, *Thick Description: Toward an Interpretive Theory of Culture*, in *The Interpretation of Cultures: Selected Essays* 28–29 (1973) (describing turtle myth).

44. Peonage Abolition Act, 14 Stat. at 546

45. Peonage customarily entailed an obligation to labor for someone to pay off a debt. Indentured servitude arrangements that brought many early settlers to the American colonies, for example, generally obligated the immigrant to work for a specified number of years to pay for his transportation and upkeep. Similar obligations, including harsh working conditions, were later imposed on Asian immigrants and former slaves. See, e.g., Steinfeld, *Invention of Free Labor*, supra note 38, at 51, 137, 177 (explaining obligation structure of indentured servitude contracts, use of indentured servitude by slave owners to "keep their former slaves in bondage," and use of indentured servitude contracts for Chinese immigrants in mid-nineteenth century); see also Aviam Soifer, *The Paradox of Paternalism and Laissez-Faire Constitutionalism: United States Supreme Court, 1888–1921*, 5 *Law & Hist. Rev.* 249, 270–74 (1987) [hereinafter, Soifer, *Paradox of Paternalism*] (explaining that in early twentieth-century Supreme Court case law, "[f]reedom of contract remained sufficiently vital to preclude intervention in labor-management affairs, particularly when the state's policy suggested redistribution of wealth or power"); Wilma Sur, *Hawai'i's Masters and Servants Act: Brutal Slavery?*, 31 *U. Haw. L. Rev.* 87, 108–12

enforcement of these prohibitions clearly was and would remain an overwhelming problem, it bears noting that the Thirty-Ninth Congress finally passed the Military Reconstruction Act over President Johnson's veto on March 2, 1867—the same day it adopted the Peonage Act.

The Military Reconstruction Act, which divided the eleven Southern states (except Tennessee) into five military districts to be occupied by the United States Army, is hardly rooted in an ethos of states' rights or state sovereignty.<sup>46</sup> For many good reasons, Congress remained deeply concerned about the adequacy of the protection that was being provided by state and local officials to blacks and their allies in the South. Indeed, Congress's order of military occupation suggests an overarching legislative concern regarding the tragic consequences that freedmen and Unionists faced as a result of egregious, widespread failure to afford them even basic protection.

Defying the President, the Act also laid out steps for the organization and admission of new states that included affording manhood suffrage to all, writing new state constitutions, and ratifying the Fourteenth Amendment.<sup>47</sup> Andrew Johnson's most recent biographer, Annette Gordon-Reed, described the President as "beside himself" as he declared the Act to be a product of "anarchy and chaos" and saw it as an attempt to hurt Southerners in order "to protect niggers."<sup>48</sup> The Thirty-Ninth Congress also added a new Habeas Corpus Act that, like the Civil Rights Act of 1866, extensively increased the possibilities for removal of state cases to federal court.<sup>49</sup> Finally, the Thirty-Ninth Congress ended by calling the Fortieth Congress into session two days later.<sup>50</sup>

### C. Cases and Implications

W.R. Brock argued in his exemplary study of the early Reconstruction period that Congress sought legislative supremacy some-

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(2008) (discussing violent conditions imposed on Hawai'i's Japanese and Chinese contract laborers). The contractual obligation approach is still in use today. See Trafficking Victims Protection Act, 22 U.S.C. §§ 7101, 7102(4) (2006) (finding "the degrading institute of slavery" exists in twenty-first century in form of indentured servitude and describing debt bondage structure of modern human trafficking).

46. An Act to Provide for the More Efficient Government of the Rebel States (Military Reconstruction Act), ch. 153, § 5, 14 Stat. 428, 429 (1867).

47. *Id.*

48. Gordon-Reed, *supra* note 30, at 129–30 (quoting Trefousse, *supra* note 32, at 279). Johnson also had declared, "This is a country for white men, and by God, as long as I am President, it shall be a government for white men." *Id.* at 112 (citing Trefousse, *supra* note 32, at 236).

49. Habeas Corpus Act of 1867, ch. 28, 14 Stat. 385.

50. Foner, *Reconstruction*, *supra* note 8, at 276–77. Foner noted, "The astonishingly rapid evolution of Congressional attitudes that culminated in black suffrage arose both from the crisis created by the obstinacy of Johnson and the white South, and the determination of Radicals, blacks, and eventually Southern Unionists not to accept a Reconstruction program that stopped short of this demand." *Id.* at 277.

what akin to the British parliamentary system.<sup>51</sup> There is certainly considerable evidence that the men of the Thirty-Ninth Congress trusted neither the executive nor the Supreme Court. They were also committed to changing the nature of federalism.

In the years that followed the final adjournment of the Thirty-Ninth Congress, the Supreme Court provided an ample basis for that distrust. In *Blyew v. United States*, for example, in the context of the horrific murder of members of a black family, the Court held that the Federal Civil Rights Act of 1866 did not trump a Kentucky statute that forbade blacks from testifying against whites.<sup>52</sup> Dissenting, Justices Bradley and Swaine explained that section 1 of the 1866 Civil Rights Act reached state inaction and that it "provides a remedy where the State refuses to give one; where the mischief consists in inaction or refusal to act, or refusal to give requisite relief."<sup>53</sup> The evisceration of the Privileges or Immunities Clause of the Fourteenth Amendment in the *Slaughter-House Cases*, which was

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51. See generally Brock, *supra* note 13.

[T]he Republicans could hardly fail to be conscious of the weight of opinion behind them, and it was not unexpected that they should have spoken of themselves as national representatives of the national will, and regarded a President who had been repudiated and a Supreme Court which represented no one and still contained members who had concurred in the notorious Dred Scott decision as their inferiors in the scales of popular government. Legislative supremacy looked more logical, more desirable and more just than executive encroachments or judicial usurpations. If this view was challenged, as Johnson challenged it, by stating that a Congress which excluded eleven States was no Congress, it could be claimed that a Congress which had had authority to fight the war must have equal authority to decide the conditions of peace.

*Id.* at 7.

52. 80 U.S. (13 Wall.) 581, 593 (1872) ("[T]he Circuit Court had not jurisdiction of the crime of murder . . . because two persons who witnessed the murder were citizens of the African race, and for that reason incompetent by the law of Kentucky to testify in the courts of that State."); see also Ky. Rev. Stat., ch. 107, § 1 (1860); Robert D. Goldstein, *Blyew: Variations on a Jurisdictional Theme*, 41 Stan. L. Rev. 469, 500-08 (1989) (detailing Court's holding); Soifer, *Full and Equal Rights*, *supra* note 6, at 206-08 (discussing facts, holding, and impact of *Blyew* decision).

53. *Blyew*, 80 U.S. at 597 (Bradley, J., dissenting). In fact, Justice Bradley's dissent offered a précis of the predominant argument throughout the final year of the Thirty-Ninth Congress that clearly embraced national protection of civil rights:

Merely striking off the fetters of the slave, without removing the incidents and consequences of slavery, would hardly have been a boon to the colored race. Hence, also, the amendment abolishing slavery was supplemented by a clause giving Congress power to enforce it by appropriate legislation. No law was necessary to abolish slavery; the amendment did that. The power to enforce the amendment by appropriate legislation must be a power to do away with the incidents and consequences of slavery, and to instate the freedmen in the full enjoyment of that civil liberty and equality which the abolition of slavery meant.

*Id.* at 601.

anchored in states' rights rhetoric and in pre-Civil War notions of federalism, soon followed.<sup>54</sup>

By 1875, the unanimous Supreme Court could proclaim that it was obliged to "roll back the tide of time, and to imagine ourselves" back in Mississippi before abolition.<sup>55</sup> Once having performed this extraordinary feat of time travel, the Court found it remarkably easy to deny a former slave any share from the proceeds of cotton sold after the United States Army impounded it in 1863 on the plantation where he literally had slaved away for many years. Everyone knew, after all, that a slave in Mississippi could not make a contract.<sup>56</sup> The fervor to return to what purported to be some form of normalcy—and the urge to reconstitute both states' rights and racial discrimination—was powerful enough to bury the vital statutory protections of 1866–1867. The radical revision of federalism triggered by the Civil War and its aftermath that had boldly proclaimed a New Birth of Freedom quickly became an abandoned child.<sup>57</sup>

#### *D. Dimensions of Added Protections*

The motivations among the members of Congress and their supporters were not entirely benign, to be sure. Some wanted to make sure that the recently freed blacks did not migrate North, for instance, and others were interested primarily in black suffrage and what it might do to help the Republican Party. Some betrayed many of the appalling qualities of paternalistic racism. In addition, in 1866 Congress was engaged in a complex, practical tug-of-war about when and how the Southern states that

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54. 83 U.S. (16 Wall.) 36, 37 (1873) ("But with the exception of these and a few other restrictions, the entire domain of the privileges and immunities of citizens of the States, as above defined, lay within the constitutional and legislative power of the States, and without that of the Federal government.").

55. *Hall v. United States*, 92 U.S. 27, 30 (1875). Hall asserted that he had been born a free man, but the Court determined that it did not have to reach this issue because Hall had been sold and held in Mississippi as a slave, his color presumptively made him a slave, and he had not availed himself of a Mississippi statute that was the exclusive means to claim one's freedom. *Id.*

56. For the unanimous Court, Justice Swayne further explained,

It was an inflexible rule of the law of African slavery, wherever it existed, that the slave was incapable of entering into any contract, not excepting the contract of marriage. . . . [Thus] it is clear that if Hall did contract with Roach, as he alleges he did, the contract was an utter nullity. In the view of the law, it created no obligation, and conferred no rights as to either of the parties. It was as if it were not. This case must be determined as if slavery had not been abolished in Mississippi, and the laws referred to were still in force there. The destruction of the institution can have no effect upon the prior rights here in question.

*Id.* at 30–31.

57. Soifer, *Promises Unkept*, *supra* note 8, at 1950 ("A kind of deep structure of belief in states' rights and sovereignty was an essential factor in the failure of Reconstruction").

had seceded could reenter the Union.<sup>58</sup> As Leon Litwack's great book, *Been in the Storm So Long*, makes abundantly clear, however, it also was terribly apparent that life in the South was chaotic and dangerous at best and that the Freedmen's Bureau and military personnel who were present were woefully inadequate to afford actual protection.<sup>59</sup>

The government's duty to afford protection was a major trope in the discussion of slavery and of the meaning of rights leading up to the Civil War, perhaps most famously when it was listed first among all rights in Justice Bushrod Washington's much-cited opinion in *Corfield v. Coryell*.<sup>60</sup> Though the phrase "equal protection" had taken on some particular connotations prior to the Civil War,<sup>61</sup> lawyers, judges, and the general public all have almost entirely lost the "protection" part of that phrase through our focus on its implications for equality considerations. Furthermore, the awkward phrasing of Section 1 of the Fourteenth Amendment—as it was declared to be ratified by Secretary of State William Seward in 1868—has allowed judges and scholars to assume that the obligation imposed on every state not to "deny to any within its jurisdiction the equal protection of the laws" forbids only active denial of such protection.<sup>62</sup>

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58. See, e.g., *id.* at 1947 ("Moderates also allied with many Radicals in their desire to keep the freedmen in the South, and to respond to the threat of increased congressional power for the South now that blacks counted as full persons for purposes of calculating representation."); see also Brock, *supra* note 13, at 95–105 (describing initiatives and conflicts during First Congressional Reconstruction).

59. See generally Litwack, *supra* note 24 (noting African Americans' struggle for independence from end of Civil War through Reconstruction period).

60. 6 F. Cas. 546, 551–52 (Washington, Circuit Justice, C.C.E.D. Pa. 1823) (No. 3230).

61. Chief Justice Lemuel Shaw's opinion in *Roberts v. City of Boston*, in which the Massachusetts Supreme Judicial Court rejected a challenge to the segregation of Boston's public schools, interpreted equal protection not to include the notion that "men and women are legally clothed with the same civil and political powers, and that children and adults are legally to have the same functions and be subject to the same treatment." 59 Mass. (5 Cush.) 198, 206 (1850). Rather, Shaw proclaimed, the equal protection that was mentioned in the Massachusetts Constitution meant "only that the rights of all, as they are settled and regulated by law, are equally entitled to the paternal consideration and protection of the law for their maintenance and security." *Id.*

This embrace and at least partial conflation of "paternal consideration" and "protection of the law" helps to explain why Justice Brown was delighted to invoke Shaw's decision and to quote his language in rejecting Homer Plessy's attack on segregation in *Plessy v. Ferguson*, 163 U.S. 537, 544 (1896). To the *Plessy* Court, it was "too clear for argument" that the Thirteenth Amendment abolished nothing beyond slavery, bondage, and—somewhat remarkably—"the control of the labor and services of one man for the benefit of another, and the absence of a legal right to the disposal of his own person, property, and services." *Id.* at 542.

62. U.S. Const. amend. XIV, § 1. There may be a little willful amnesia regarding the building blocks of judicial review under the Constitution taught in Constitutional Law I. In *Marbury v. Madison*, Chief Justice John Marshall noted for the unanimous Court that "[t]he very essence of civil liberty certainly consists in the right of every individual to claim



If the historical context of the Fourteenth Amendment still warrants consideration, as many people still believe it should, it ought to be of considerable concern that Chief Justice Rehnquist carried his binary action/inaction approach to absurd lengths in *DeShaney v. Winnebago County Department of Social Services*.<sup>63</sup> Writing for the majority, Rehnquist announced that the purpose of the Due Process Clause of the Fourteenth Amendment was “to protect the people from the State, not to ensure that the State protected them from each other. The Framers were content to leave the extent of governmental obligation in the latter area to the democratic political processes.”<sup>64</sup> Using a rigidly dichotomous approach, the Court held that Wisconsin had no constitutional duty to protect a four-year-old child who was being regularly visited by social workers employed by the state after the state courts had awarded custody to the child’s abusive father. Because “[p]oor Joshua”<sup>65</sup> was not formally in state custody, Rehnquist explained, the state owed him no protection.<sup>66</sup>

This is not to say that it would be easy to sort out when, how, and to whom government actors owe protection. Such protection surely has jagged edges much of the time, not least because it easily blurs into

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the protection of laws, whenever he receives an injury. One of the first duties of government is to afford that protection.” 5 U.S. (1 Cranch) 137, 163 (1803).

63. 489 U.S. 189 (1989). For this and numerous additional reasons, the author critiqued the *DeShaney* decision to the point of calling it “an abomination.” Aviam Soifer, *Moral Ambition, Formalism, and the “Free World” of DeShaney*, 57 Geo. Wash. L. Rev. 1513, 1514 (1989). Though in retrospect this phrasing seems extreme, it also still seems accurate.

64. *DeShaney*, 489 U.S. at 196. In denying that Wisconsin had any affirmative duty to protect a child who was two years old when state officials first became involved with his case and four when his father beat him so severely that he suffered “brain damage so severe that he is expected to spend the rest of his life confined to an institution for the profoundly retarded,” *id.* at 193, Chief Justice Rehnquist hewed closely to Judge Posner’s analysis for the Seventh Circuit below. Posner had said “The state does not have a duty enforceable by the federal courts to maintain a police force or a fire department, or to protect children from their parents.” 812 F.2d 298, 301 (7th Cir. 1987), *aff’d*, 489 U.S. 189. Dissenting, Justice Brennan, joined by Justices Marshall and Blackmun, offered a devastating critique of the majority’s “fixation on the general principle that the Constitution does not establish positive rights.” 489 U.S. at 205 (Brennan, J., dissenting).

65. 489 U.S. at 213 (Blackmun, J., dissenting.) Blackmun added, Victim of repeated attacks by an irresponsible, bullying, cowardly, and intemperate father, and abandoned by respondents, who placed him in a dangerous predicament and who knew or learned what was going on, and yet did essentially nothing except, as the Court revealingly observes, “dutifully recorded these incidents in [their] files.” It is a sad commentary upon American life, and constitutional principles—so full of late of patriotic fervor and proud proclamations about “liberty and justice for all”—that this child, Joshua DeShaney, now is assigned to live out the remainder of his life profoundly retarded.

*Id.* (citation omitted). Blackmun’s *cri de coeur* also tellingly invokes Robert Cover, *Justice Accused* (1975), a brilliant study of the cognitive dissonance among judges who were personally opposed to slavery yet protested too much that their hands were tied and that they thus were obliged to return fugitives to slavery.

66. 489 U.S. at 201 (majority opinion).

paternalism. By 1866, for example, the self-evident problems surrounding the ways in which the federal government had been mistreating its Indian "wards" underscored the pitfalls and complexity of such guardian-ward relationships. Yet members of the Thirty-Ninth Congress were all too aware of the desperate need to protect the freedpersons and their allies. Eric Foner summed up the situation: "Again and again during the debate on Trumbull's bills, Congressmen spoke of the national government's responsibility to protect 'fundamental rights' of American citizens."<sup>67</sup> Foner added, however, that "as to the precise content of these rights, uncertainty prevailed."<sup>68</sup> Nonetheless, even Moderates preferred to give both Congress and the federal courts "maximum flexibility in implementing the [Fourteenth] Amendment's provisions and combating the multitude of injustices that confronted blacks in many parts of the South."<sup>69</sup>

#### E. *State Action?*

It seems a major mistake, considering both the broad and the specific historical context, to attempt to draw a fundamental or bright line between private actions reached by the Thirteenth Amendment and private actions that remain insulated from judicial review by the after-the-fact "state action" requirement, purportedly imposed by the Fourteenth Amendment. The substantial restraint on both federal legislative and judicial powers that the state action requirement imposes actually was a judicial construct, infamously applied by the Supreme Court in the *Civil Rights Cases* to invalidate the public accommodations provisions of the 1875 Civil Rights Act that had been passed in large measure to memorialize Senator Sumner.<sup>70</sup>

Justice Bradley's opinion for the majority in the *Civil Rights Cases* instructed black citizens that, less than eighteen years after slavery ended, it was past time that a black man "takes the rank of a mere citizen, and ceases to be the special favorite of the laws."<sup>71</sup> In addition, the Court held that it would be "running the slavery argument into the ground" to find that Thirteenth Amendment protections against the badges and incidents of slavery extended to prohibit racial discrimination in places of public accommodation.<sup>72</sup>

In fact, however, there is very little, if any, support for the "state action" limitation within the debates and the legislation promulgated by

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67. Foner, *Reconstruction*, supra note 8, at 244.

68. *Id.*

69. *Id.* at 258.

70. 109 U.S. 3, 25 (1883).

71. *Id.* at 24-25. Notably, the majority assumed that blacks had in fact been special favorites of the law—presumably referring to congressional legislation anchored in both the Thirteenth and Fourteenth Amendments.

72. *Id.* at 24.

the Thirty-Ninth Congress—the Congress that also drafted and approved the Fourteenth Amendment. In his dissent in *Jones v. Alfred H. Mayer Co.*, Justice Harlan struggled to make the case for a state action requirement within the 1866 Civil Rights Act,<sup>73</sup> but the majority had the much stronger argument. Indeed, if one reads the very quotations that Justice Harlan relied upon in his dissent in the context of the recognized governmental duty to protect the rights of all citizens in the wake of the Civil War, it is clear that the men of the Thirty-Ninth Congress hoped in the first instance that the states would do their duty, but that they also sought to make sure that the federal government would serve as a back-stop and guarantor if the states did not.<sup>74</sup> The 1866 Civil Rights Act greatly expanded the coverage of federal criminal law as well as the removal jurisdiction of federal courts if and when states failed to protect the broad panoply of civil rights identified in its first section. Until 1968 and *Jones*, however, the portions of the 1866 Act that remained on the statute books had long been buried under an avalanche of decisions making “state action” and “color of state law” inescapable prerequisites in civil rights litigation.<sup>75</sup>

Charles L. Black, Jr., the great constitutional law scholar, teacher, and lawyer, published a remarkable article in 1967 that made a compelling case for abandoning the “state action” requirement entirely for rights guaranteed by the Fourteenth Amendment.<sup>76</sup> He pointed out that by 1967—long before the chaotic development of state action doctrine in a series of opinions written largely by Chief Justice Rehnquist—lawyers

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73. 392 U.S. 409, 449–50 (1968) (Harlan, J., dissenting) (“[T]he Court’s construction of § 1982 as applying to purely private conduct is almost surely wrong, and at the least is open to serious doubt.”).

74. Soifer, *Protecting Civil Rights*, supra note 8, at 676 (“All citizens were to have the same rights—and the complete and equal benefit of all laws and proceedings for security of person and property—as enjoyed by paradigmatic white citizens. Any law or statute to the contrary was superseded.” (citations omitted)).

75. See, e.g., *The Civil Rights Cases*, 109 U.S. at 11 (holding Act only “provide[s] modes of relief against State Legislation, or State action”); *Evans v. Newton*, 382 U.S. 296, 299 (1966) (analyzing lines between private and state action); *Flagg Bros. v. Brooks*, 436 U.S. 149, 164–66 (1978) (rejecting claim that state had delegated traditional power to warehouseman through role of sheriff in property seizure). The “state action” prerequisite loomed large during the congressional debates that produced the Civil Rights Act of 1964 and explains why Congress ultimately felt it necessary to rely on the Commerce Clause and the Spending Power. See *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 292–93 n.1 (Goldberg, J., concurring) (discussing legislative history of Civil Rights Act of 1964). The requirement to prove action “under color of state law” stretches back to early, narrow constructions of what is now 42 U.S.C. § 1983. Recent decisions narrowing *Monroe v. Pape*, 365 U.S. 167 (1961), have established a more stringent requirement of state involvement. See, e.g., *Gonzaga University v. Doe*, 536 U.S. 273, 283 (2002) (holding only “unambiguously conferred right” supports cause of action brought under § 1983); *Anderson v. Creighton*, 483 U.S. 635, 645–46 (1987) (expanding “qualified immunity” to protect police officers who “could have believed” warrantless search was lawful).

76. Charles L. Black, Jr., *The Supreme Court, 1966 Term—Foreword: “State Action,” Equal Protection, and California’s Proposition 13*, 81 Harv. L. Rev. 69, 107 (1967).

and judges were spending a great deal of time, effort, and resources to answer a question entirely preliminary to getting to the merits of any particular dispute.<sup>77</sup> Black acknowledged that there might well be privacy claims, for instance, that could and sometimes should trump equal protection arguments.<sup>78</sup> His forceful argument was, however, that it would be best to get to the merits and to wrestle directly with such a conflict, rather than to wastefully shadowbox through seemingly endless inquiries as to what facts, circumstances, and entanglements by state actors would suffice to constitute the required state action.<sup>79</sup>

Black was well into his eighties when he published *A New Birth of Freedom*, in which he explained and expounded upon Abraham Lincoln's concept of national citizenship rights and his own constitutional theory, combining the Declaration of Independence and the Ninth Amendment with the rights and protections afforded by the post-Civil War Amendments.<sup>80</sup> Black said that the alternative to the fundamental recognition of kinship was—as he put it with characteristic flair—to be haunted by the “grisly undead corpse of ‘states rights,’” of the sort associated with South Carolina's John C. Calhoun.<sup>81</sup>

Ironically, albeit perhaps not entirely intentionally, the majority and concurring opinions in *McDonald v. City of Chicago*<sup>82</sup> follow Charles Black

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77. See *id.* at 70 (“The amenability of racial injustice to national legal correction is inversely proportional to the durability and scope of the state action ‘doctrine,’ and of the ways of thinking to which it is linked.”).

78. See *id.* at 100 (“[E]xpansion of the ‘state action’ concept to include every form of state fostering, enforcement, and even toleration does not have to mean that the fourteenth amendment is to regulate the genuinely private concerns of man.”).

79. See *id.* at 100–01 (“[T]he thing needed . . . is not a doctrine of ‘state action’ unresponsive entirely in terms and only crudely and fitfully responsive in application to the required distinction, but rather a substantive rule of reason operating in the interpretation of the equal protection clause . . .”).

80. Charles L. Black, Jr., *A New Birth of Freedom: Human Rights, Named and Unnamed*, at ix (1997) [hereinafter Black, *A New Birth of Freedom*].

81. *Id.* at 80; Charles L. Black, Jr., *Paths to Desegregation*, in *The Occasions of Justice, Essays Mostly on Law* 144, 160 (1963).

82. 130 S. Ct. 3020 (2010). The relevant parts of Justice Alito's opinion were joined by a majority of the Court. *Id.* at 3026.

As a textual and historical matter, however, even Justice Thomas's broad privileges and immunities theory ought not to apply the Takings Clause to the states. Cf. *id.* at 3059 (Thomas, J., concurring) (“[T]he right to keep and bear arms is a privilege of American citizenship that applies to the States through the Fourteenth Amendment's Privileges or Immunities Clause.”). That Clause from the Fifth Amendment was intentionally omitted from the language of the Fourteenth Amendment while other Fifth Amendment language was repeated verbatim, the author has argued, primarily to avoid attempts by former slaveholders to seek compensation for having had their slave property taken from them. See Aviam Soifer, *Text-Mess: There Is No Textual Basis for Application of the Takings Clause to the States*, 28 U. Haw. L. Rev. 373, 379–80 (2006) (noting “the leading members of Congress and their allies very recently had ‘taken’ huge amounts of ‘property’ from southern slaveholders” and “[j]ust compensation, to put it mildly, . . . can[not] . . . be said

in recognizing the incorporation of fundamental protections through the post-Civil War Amendments in ways that radically altered federalism.

Justice Alito's opinion emphasized that the protections embodied in Section 1 of the Fourteenth Amendment built directly on the earlier statutes and extended well beyond antidiscrimination. He claimed, for example, that "[t]he unavoidable conclusion is that the Civil Rights Act, like the Freedmen's Bureau Act, aimed to protect 'the constitutional right to bear arms' and not simply to prohibit discrimination."<sup>83</sup> Alito's expansive concept of foundational rights guaranteed by the federal government to both blacks and their white supporters through statutes and the Fourteenth Amendment gave short shrift to federalism concerns. To assure that the right to bear arms is not "a second-class right" and that the Fourteenth Amendment affords protection beyond its antidiscrimination meanings, Alito emphasized the statutory and constitutional promise of "full and equal" federal protection for foundational, substantive rights.<sup>84</sup> Justice Scalia, despite what he declared to have been initial reluctance, again concurred in what he called a "long established and narrowly limited" selective incorporation approach to judicial intervention premised on substantive due process.<sup>85</sup>

It was Justice Thomas's attempt to resuscitate the Privileges or Immunities Clause of the Fourteenth Amendment that most emphatically argued for basic rethinking of the post-Civil War period—a time when constitutional amendments were enacted to "repair the Nation from the damage slavery had caused."<sup>86</sup> Indeed, Thomas proclaimed, "§ 1 of the Fourteenth Amendment . . . significantly altered our system of government."<sup>87</sup>

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to have had much to do with the new inclusion of 'privileges or immunities' or 'equal protection' in the Federal Constitution through the Fourteenth Amendment").

83. 130 S. Ct. at 3040–41.

84. See *id.* at 3036–44. It is striking that Alito relied on such Radical Republican leaders as Senator Charles Sumner and Representative Thaddeus Stevens—and even the outspoken abolitionist Lysander Spooner—as well as Charles Black, Jr. and Eric Foner to build his case for federal protection of fundamental rights. See, e.g., *id.* at 3030, 3038, 3041.

85. *Id.* at 3050 (Scalia, J., concurring) (quoting *Albright v. Oliver*, 510 U.S. 266, 275 (1994) (Scalia, J., concurring)).

86. *Id.* at 3060 (Thomas, J., concurring). To be sure, the Court has recognized this fundamental change before without it seeming to matter much. See, e.g., *Patsy v. Bd. of Regents*, 457 U.S. 496, 503 (1982) (referring to "the basic alteration of our federal system accomplished during the Reconstruction Era"); *Edelman v. Jordan*, 415 U.S. 651, 664 (1974) ("[T]he Civil War Amendments to the Constitution . . . serve as a sword, rather than merely as a shield, for those whom they were designed to protect.").

87. 130 S. Ct. at 3060 (Thomas, J., concurring). Thomas went on to explain that the logical reading of Section 1's provision that "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States" is as an affirmative guarantee of rights. *Id.* at 3077. The same could and should be said of the provision that follows, which declares that "nor shall any state . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1.

These *McDonald* opinions almost surely say more about the Court's enthusiasm for guns—framed in terms of “[s]elf-defense [a]s a basic right”<sup>88</sup>—than about any fundamental rethinking of the recent recrudescence of judicial limits on Congress's power that is purportedly anchored in federalism. The source for the new right applied to the states may be a new category of undifferentiated fundamental rights that stretch well beyond antidiscrimination principles or, perhaps, some grudgingly accepted new substantive due process rights, or even the revitalized attention to the privileges or immunities of national citizens urged by Justice Thomas. Nonetheless, unless *McDonald* turns out to be a ticket good for this right and this right only, its reasoning ought to complicate renewed efforts to retrench post-Civil War constitutional guarantees premised on abstract states' rights theories.

That said, however, the capacity of lawyers and judges to ignore history and interpose the barriers they desire remains quite alarming. Several recent cases involving alleged human trafficking and other forms of appalling exploitation construed the Thirteenth Amendment and the contemporary version of the Peonage Abolition Act of 1867 in alarming ways. After all, even the *Civil Rights Cases* majority had acknowledged that

[t]his [Thirteenth] [A]mendment, as well as the Fourteenth, is undoubtedly self-executing without any ancillary legislation, so far as its terms are applicable to any existing state of circumstances. By its own unaided force and effect it abolished slavery, and established universal freedom. Still, legislation may be necessary and proper to meet all the various cases and circumstances to be affected by it, and to prescribe proper modes of redress for its violation in letter or spirit. And such legislation may be primary and direct in its character; for the amendment is not a mere prohibition of State laws establishing or upholding slavery, but an absolute declaration that slavery or involuntary servitude shall not exist in any part of the United States.<sup>89</sup>

Yet federal judges in recent years have gone so far as to assert that the Thirteenth Amendment cannot be self-executing and that federal civil actions based on the current version of the Peonage Abolition Act

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88. 130 S. Ct. at 3035 (majority opinion).

89. 109 U.S. 3, 20 (1883). Justice Bradley continued,

It is true, that slavery cannot exist without law, any more than property in lands and goods can exist without law: and, therefore, the Thirteenth Amendment may be regarded as nullifying all State laws which establish or uphold slavery. But it has a reflex character also, establishing and decreeing universal civil and political freedom throughout the United States; and it is assumed, that the power vested in Congress to enforce the article by appropriate legislation, clothes Congress with power to pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United States . . .

*Id.*

require state action.<sup>90</sup> Without explanation, a statute passed before the Fourteenth Amendment was ratified thus has taken on a state action requirement that is dubious within the terms of the Fourteenth Amendment, but nonexistent within the Thirteenth Amendment.

The need to act forcefully in the face of extraordinary failures to protect citizens was a major theme informing both Amendments, as this Essay argued above. Congress was quite confident of its broad enforcement power when it passed the Civil Rights Act of 1866 and the Peonage Abolition Act of 1867. Yet it now seems impossible to reconcile the contemporaneous Thirty-Ninth Congress's views of its own enforcement power with recent interpretations by the Court. To describe *Board of Trustees v. Garrett*<sup>91</sup> and *United States v. Morrison*,<sup>92</sup> for example, as "crabbed interpretations" of Congress's power to enforce constitutional rights seems almost insulting to crabs. Neither abstract theories of "our federalism" nor uncritical faith in the virtues of individualism ought to blind us to promises made by the Thirty-Ninth Congress. Unlike Andrew Johnson, members of the Thirty-Ninth Congress came to understand the need to protect all citizens and to guarantee full as well as equal benefits of all laws and proceedings, even for those who seemingly consented to contracting away their basic rights.

## II. PROTECTION AND PATERNALISM: THE CONCEPT OF "VOLUNTARY PEONAGE"

Voluntary peonage might seem a contradiction in terms—it would initially appear that peonage, by definition, cannot be voluntary. Indeed, the idea of entering peonage voluntarily does pose a philosophical challenge. Yet even brief consideration of the concept will suggest that voluntary peonage has a distinguished lineage. In addition, a sampling of judicial decisions about involuntary servitude—including several relatively recent examples by distinguished judges—illustrates how important the

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90. *John Roe I v. Bridgestone Corp.*, 492 F. Supp. 2d 988, 997–98 (S.D. Ind. 2007) (discussing precedent and finding "*The Civil Rights Cases* did not hold or suggest that there is a private right of damages directly under the Thirteenth Amendment, nor is such a private right of damages intended for the Thirteenth Amendment to be effective"); *Jane Doe I v. Reddy*, No. C 02-05570 WHA, 2003 WL 23893010, at \*11 (N.D. Cal. Aug. 4, 2003) (rejecting argument that Peonage Abolition Act "was intended to implement the Thirteenth Amendment, whose language it mirrors and which has no state-action requirement"); cf. *Craine v. Alexander*, 756 F.2d 1070, 1074 (5th Cir. 1985) (concluding "plaintiffs proceeding under [the Peonage Abolition Act] must show some state responsibility for the abuse complained of"). See generally Jennifer S. Nam, *The Case of the Missing Case: Examining the Civil Right of Action for Human Trafficking Victims*, 107 Colum. L. Rev. 1655 (2007) (describing underutilization of civil right of action for trafficking victims).

91. 531 U.S. 356, 360 (2001) (finding Eleventh Amendment bars suits to "recover money damages by reason of [a] State's failure to comply with the . . . Americans with Disabilities Act of 1990").

92. 529 U.S. 598, 601–02 (2000) (finding "Congress lacked constitutional authority to enact . . . a federal civil remedy for the victims of gender-motivated violence").

relevant provision in the Peonage Abolition Act of 1867 might have been had it survived stingy judicial interpretations and what almost seems to be purposeful amnesia.

#### A. *Bible Stories*

The Hebrew Bible's story of Jacob—another kind of founding father—offers a striking example of voluntary servitude.<sup>93</sup> Jacob's decisions have been discussed over many centuries, but he is generally celebrated for his persistence within an extended condition of voluntary peonage. In order to marry Laban's daughter, Rachel, a woman he loved at first sight, Jacob proposed that he work for Laban for seven years. When Jacob finished his term of years, however, Laban tricked him into marrying Laban's older daughter, Leah, instead.<sup>94</sup> Undeterred, Jacob signed on for another seven years and, finally, the hero of the story did get the girl.

Of course, the Hebrew Bible accepts and is actually quite specific about slavery. A Hebrew slave, for instance, was to be freed after seven years. "But," according to Exodus 21:5–6, "if the slave declares, 'I love my master, and my wife and children: I do not wish to go free,'" then the slave was to be free to make such a choice—though the master was commanded to pierce the ear of the slave with an awl and the slave was then to remain a slave for the rest of his life.<sup>95</sup>

In the nineteenth century, the Bible's embrace of slavery became a commonplace defense of slavery and was a key element in the schisms that split many Christian denominations in the United States.<sup>96</sup> For centuries, a central justification for slavery had been that captors were entitled to kill their captives; therefore, it was argued widely, the decision to merely enslave captives was actually an act of mercy.<sup>97</sup> This classic example of the "greater power includes the lesser power" type of argument focuses on the consent of the master, but the truly tragic choices that slaves faced in the United States also purportedly contained elements of consent as well as emotional and intellectual resistance. As the old freedom song put it, for example, "Oh freedom, oh freedom, oh

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93. Genesis 29:1–30 (Etz Hayim).

94. As Genesis succinctly puts it, "Leah had weak eyes; Rachel was shapely and beautiful." *Id.* at 29:17.

95. Exodus 21:5–6 (Etz Hayim).

96. See Sydney E. Ahlstrom, *A Religious History of the American People* 648–69 (2004).

97. See, e.g., *The Debates of the Constitutional Convention of the State of Maryland* 931 (Annapolis, Richard P. Bayly 1864) (statement of Rep. George Sands) ("[I]f [the captor] spared the lives of those he took captive, it was his own gift and he had the right to the benefit of it.").



freedom over me/And before I'd be a slave I'll be buried in my grave/And go home to my Lord and be free."<sup>98</sup>

As the Civil War approached, advocates speaking on behalf of what antislavery activists began to call the Slave Power grew increasingly defensive, and their attacks on what they labeled Wage Slavery in the North became more vehement. Indeed, their defense of the humanity of slavery, in contrast to the harshness of the wage system, extended so far as to include creating a statute that established a process through which a free black could find a master and then choose to become a slave.<sup>99</sup> Unsurprisingly, no evidence suggests this statute was ever utilized. Furthermore, in the spring of 1862, before there was any word of Lincoln's Emancipation Proclamation, Union Major General David Hunter jumped the gun when he declared that all former slaves who came within the territory his troops controlled in the Department of the South were instantly free and that volunteer black soldiers were welcome. Hunter defended his action by explaining that he had armed former slaves so that, under his "fugitive master law," they could "pursue, capture and bring back those persons of whose protection they ha[d] . . . been suddenly bereft."<sup>100</sup> Though Hunter's sardonic humor caused controversy and his bold declaration was reversed by President Abraham Lincoln, Eric Foner's prize-winning recent study of Lincoln compellingly demonstrates how quickly and how much Lincoln himself, and the views of many in the North, changed in the course of the war concerning how to deal with former slaves.<sup>101</sup>

#### B. *The Freedom to Choose Slavery*

Even under the law of slavery, blacks who became free when their masters took them into states that had abolished slavery often confronted gut-wrenching decisions. To remain free in the North often would mean abandoning partners—because slave marriages were not allowed—as well as children who remained enslaved. In *Betty's Case*, for example, Massachusetts Chief Justice Lemuel Shaw declared, after a ten-minute interview with a young woman who had been a slave in Tennessee, that it would be "a denial of her freedom" to reject her decision to return to

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98. Lucy Kinchen Chorale, *Oh Freedom, on Oh Freedom!* (Lucy Kinchen Chorale 2003). See generally Toni Morrison, *Beloved* (1987).

99. See, e.g., Va. Code tit. 30, ch. 103, § 3 (1869) ("It shall be lawful for any free person of color, resident within this commonwealth, of the age of eighteen years if a female, and of the age of twenty-one years if a male, to choose his or her master, upon the terms and conditions herein after mentioned."); see generally Stanley W. Campbell, *The Slave Catchers: Enforcement of the Fugitive Slave Law, 1850–1860* (1968) (describing sustained conflict over federalism in context of fugitive slaves and free states).

100. John G. Sproat, *Blueprint for Radical Reconstruction*, 23 J.S. Hist. 25, 30 (1957) (internal quotation marks omitted).

101. Eric Foner, *The Fiery Trial: Abraham Lincoln and American Slavery* 207–08 (2010) [hereinafter Foner, *The Fiery Trial*].

slavery.<sup>102</sup> As Edlie Wong recently put it, freedom actually could be “yet another form of trauma” under such circumstances.<sup>103</sup> Indeed, antislavery activists “found themselves at an impasse: the hermeneutic limit of an emergent liberal discourse of contract premised on universalized notions of will and free choice in a partially free world.”<sup>104</sup>

Members of the Thirty-Ninth Congress might well have recalled and worried about some of the still-recent cases of slaves who “voluntarily” chose slavery over freedom. In addition, the old apprenticeship system had not fully disappeared by the 1860s. As Robert Steinfeld explained, “From its inception, indentured servitude had primarily been considered a form of contractual freedom.”<sup>105</sup> Concepts about contractual freedom changed significantly throughout the nineteenth century as workers began to believe that “[p]art of their natural liberty consisted in their power to alienate the property in their own capacities to other persons.”<sup>106</sup> Even within the rise of formal contract law after the Civil War, however, any laborer who contracted to work for another could be seen as surrendering his or her freedom while, at the same time, coerced labor was largely accepted for paupers and the like.<sup>107</sup> Even the core of the contract law paradigm could, at times, be considered to be a form of peonage. In the name of the liberty of the individual, courts would not order specific performance, yet the potential damages that could be assessed against a laborer might effectively do much the same thing. The extent to which specific performance can indeed be required remains an intriguing—but also vexed—corner of contemporary contract law.<sup>108</sup>

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102. 20 Monthly L. Rep. 455 (Mass. Nov. 9, 1857). For discussion of this case and its context, see Aviam Soifer, *Constrained Choices: New England Slavery Decisions in the Antebellum Era*, in *Freedom's Conditions in the U.S.-Canadian Borderlands in the Age of Emancipation* 173, 188–90 (Tony Freyer & Lyndsay Campbell, eds., 2011); Soifer, *Promises Unkept*, *supra* note 8, at 1921–30.

103. Edlie L. Wong, *Neither Fugitive nor Free: Atlantic Slavery, Freedom Suits, and the Legal Culture of Travel* 104 (2009).

104. *Id.* at 100.

105. Steinfeld, *Invention of Free Labor*, *supra* note 38, at 7.

106. *Id.* at 156; see also Robert J. Steinfeld, *Coercion, Contract, and Free Labor in the Nineteenth Century* 236 (2001) (“[T]he clear consensus, in the middle of the nineteenth century was that freedom should not include the freedom to alienate one’s freedom.”).

107. See generally Bruce A. Kimball, *The Inception of Modern Professional Education: C.C. Langdell, 1826–1906* (2009) (discussing Christopher Columbus Langdell and rise of case method within legal education, with emphasis on contract law); Amy Dru Stanley, *From Bondage to Contract: Wage Labor, Marriage and the Market in the Age of Slave Emancipation* (1998) (describing relationship between contract law and prohibition of slavery).

108. See generally Nathan B. Oman, *Specific Performance and the Thirteenth Amendment*, 93 Minn. L. Rev. 2020 (2009) (arguing that “involuntary servitude” does not justify *per se* prohibition on specific performance in personal service contracts); Udi Sagi, *Specific Performance of Enlistment Contracts*, 205 Mil. L. Rev. 150 (2010). Sagi points out that certain international law instruments declare that “[n]o one shall be required to

### C. Probing Paternalism

A working definition of "paternalism" that could be of use might be as follows: someone else deciding for you, allegedly for your own good. And "paternalism" has considerable potency as a pejorative label. Yet we ought to recognize that our parents and teachers exercise paternalism toward and for us repeatedly, to both good and ill effect. Even if the letters of "paternalism" were rearranged to become "parentalism," however, the question of how to ascertain genuine consent looms large and lasts for a long time in most families as well as in the law. This typically is the case on both sides of the parent-child equation. Judges often anoint themselves as protectors of individuals against paternalism, but they lack adequate criteria to determine if and when paternalism ought to be invalidated. In reality, it is exceedingly difficult for any outside decisionmakers to discern when a decision made on behalf of someone else seems to go too far. And judges often miss the fact that they often are assuming a paternalistic role themselves in determining what constitutes impermissible paternalism.<sup>109</sup>

It is striking—even shocking—to read some of the judicial interpretations of criminal laws that forbade peonage over the past several decades. Perhaps most notorious was Justice O'Connor's opinion for the Court in *United States v. Kozminski*.<sup>110</sup> The decision invalidated the convictions of members of the Kozminski family who had held two men-

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perform forced or compulsory labour." Sagi, *supra*, at 185 (alteration in original) (quoting International Covenant on Civil and Political Rights art. 8, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR]). As Sagi puts it, this language "strongly suggests a broad interpretation of the terms 'slavery' and 'servitude.'" *Id.*

Efforts by the United States to add the word "involuntary" before the prohibition on "servitude" in the ICCPR failed. *Id.* On the other hand, as Sagi points out, the International Labour Organization's Convention Concerning Forced Labour similarly prohibits "all work of service which is exacted from any person under the menace of any penalty," yet, unlike the ICCPR, it does not prohibit forced labor that was entered into voluntarily. *Id.* at 185 n.217 (quoting International Labour Organization, Convention (No. 29) Concerning Forced Labour art. 2, June 28, 1930, 39 U.N.T.S. 55).

109. In *West Coast Hotel Co. v. Parrish*—a decision that upheld minimum wages for women and that marked a crucial turning point, as the Court moved away from its aggressive activism on behalf of "liberty of contract," which had dominated its decisions for several decades—Chief Justice Hughes wrote for the Court that

exploitation of a class of workers who are in an unequal position with respect to bargaining power and are thus relatively defenceless against the denial of a living wage is not only detrimental to their health and well being but casts a direct burden for their support upon the community. What these workers lose in wages the taxpayers are called upon to pay.

300 U.S. 379, 399 (1937); see also Pope, *supra* note 4, at 1494 ("While refusing to hear coercion claims from industrial workers, the *Lochner*-era Court took a more sensitive approach toward 'groups it understood as weak,' a category including women and black peons, but not industrial workers." (quoting Aziz Z. Huq, Peonage and Contractual Liberty, 101 Colum. L. Rev. 351, 386 (2001))).

110. 487 U.S. 931 (1988).

tally retarded farm workers on a dairy farm "in poor health, in squalid conditions, and in relative isolation from the rest of society" for well over a decade.<sup>111</sup> Stressing the concept of lenity in construing criminal statutes, the Court held that even extreme psychological coercion would not suffice to render involuntary servitude criminal.<sup>112</sup> Remarkably, the decision was unanimous, though Justices Brennan and Stevens wrote concurring opinions, in which Justices Marshall and Blackmun, respectively, joined.<sup>113</sup> There was no suggestion, however, that someone should have and could have intervened—paternalistically, perhaps—to seek lost wages and other remedies on behalf of farm workers Fulmer and Molitoris. Such a lawsuit might even have been based on the statutory successor to the Peonage Abolition Act of 1867.<sup>114</sup>

Elsewhere the author has explored the paradoxical nature of paternalism in the context of Thirteenth Amendment decisions by the Supreme Court from 1888 to 1921.<sup>115</sup> The Court's actions then ranged from continuing to compel service by those too young or too old to enlist in the army,<sup>116</sup> to eviscerating the claims made by black freedmen against Indian tribes that had enslaved them,<sup>117</sup> and to rejecting claims of seamen to be free from the longstanding paternalism that imprisoned them

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111. *Id.* at 934–35. The workers, Robert Fulmer and Louis Molitoris, were directed not to leave the farm and they worked "seven days a week, often 17 hours a day, at first for \$15 per week and eventually for no pay. The Kozminskis subjected the two men to physical and verbal abuse for failing to do their work and instructed herdsmen employed at the farm to do the same." *Id.*

112. The Court held that 18 U.S.C. § 1584 and 18 U.S.C. § 241 both required proof of "compulsion of services by the use or threatened use of physical or legal coercion." *Id.* at 948, 952. Congress responded in 2000 by enacting the Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 (codified as amended in scattered titles of the U.S.C.). See Rebecca E. Zietlow, *The Promise of Congressional Enforcement*, in *The Promises of Liberty*, *supra* note 2, at 182, 190–91 (discussing congressional response to *Kozminski*).

113. 487 U.S. at 953 (Brennan, J., concurring); *id.* at 965 (Stevens, J., concurring). Perhaps even more striking was Judge Henry Friendly's pinched interpretation of § 1584 in *United States v. Shackney*, 333 F.2d 475 (2nd Cir. 1964), largely relied on by the *Kozminski* Court. Friendly warned of a slippery slope—"the awful machinery of the criminal law to be brought into play whenever an employee asserts that his will to quit has been subdued by a threat which seriously affects his future welfare but as to which he still has a choice, however painful"—and reversed the conviction of an immigrant rabbi who kept a Mexican worker working on his chicken farm with threats to have the worker deported after he had signed a two-year contract that required that he never drink or leave the farm. *Id.* at 487. Friendly interpreted the criminal statute to require a showing that there was "no way to avoid" the owner's compulsion. *Id.* at 486.

114. Act of March 2, 1867, ch. 187, sec. 1, 14 Stat. 546 (codified as amended at 42 U.S.C. § 1994). The current version of the statute differs in only minor ways from the original, omitting, for instance, the phrase "territory of New Mexico," and instead simply referring to "territory or state."

115. See generally Soifer, *Paradox of Paternalism*, *supra* note 45.

116. *In re Morrissey*, 137 U.S. 157 (1890); *In re Grimley*, 137 U.S. 147 (1890).

117. *United States v. Choctaw Nation*, 193 U.S. 115 (1904).

and forced them back to work<sup>118</sup>—allegedly for their own good.<sup>119</sup> Relatively obscure decisions often turned on whether someone was said by a judge to have consented to harsh, long-term working conditions. In an era when men seemed to “relish a ruthless theory,”<sup>120</sup> it turned out—as it probably still would turn out today—that there were both good and bad kinds of paternalism. Close study of the Court’s well-known peonage decision in *Bailey v. Alabama*,<sup>121</sup> for example, makes this clear.

Ultimately, as Justice Brennan stated in his concurrence in *Kozminski*,

It is of course not easy to articulate when a person’s actions are “involuntary.” In some minimalist sense the laborer always has a choice no matter what the threat: the laborer can choose to work, or take a beating; work, or go to jail. We can all agree that these choices are so illegitimate that any decision to work is “involuntary.”<sup>122</sup>

Brennan went on to emphasize the need for the prosecutor to prove the existence of compulsion akin to servitude to meet the criminal statute’s requirement.<sup>123</sup> Nonetheless, he also noted, “Congress intended to protect persons subjected to involuntary servitude by forms of coercion more subtle than force.”<sup>124</sup>

Both Brennan and Stevens mentioned but also sought to avoid the task of resolving “the philosophical meaning of free will” in their concurring opinions.<sup>125</sup> That such a question looms large and implicates judgments that are “highly individualized” and perhaps “hopelessly subjective”<sup>126</sup> makes the very concept of “voluntary peonage” seem even more problematic.

Nonetheless, as the Court summarized in *Pollock v. Williams*, “The undoubted aim of the Thirteenth Amendment . . . was not merely to end slavery but to maintain a system of completely free and voluntary labor

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118. *Robertson v. Baldwin*, 165 U.S. 275 (1897).

119. See Soifer, *Paradox of Paternalism*, *supra* note 45, at 260–68.

120. R. Jackson Wilson, *In Quest of Community: Social Philosophy in the United States, 1860–1920*, at 56 (1968) (quoting philosopher Charles Sanders Peirce).

121. 219 U.S. 219 (1911). Justice Hughes’s majority opinion invalidated Alabama’s presumption of criminal fraud in the breach of a labor contract, relying on the Thirteenth Amendment’s protection against “control by which the personal service of one man is disposed or coerced for another’s benefit.” *Id.* at 241. *Bailey* has been discussed by many scholars; for the author’s view, see Soifer, *Paradox of Paternalism*, *supra* note 45, at 271–73.

122. *United States v. Kozminski*, 487 U.S. 931, 959 (1988) (Brennan, J., concurring).

123. See *id.* at 961–62 (discussing interpretation of “involuntary servitude”).

124. *Id.* at 957.

125. *Id.* at 959; *id.* at 967–70 (Stevens, J. concurring) (advocating case-by-case, rather than hypothetical, approach including varied interpretations of what constitutes compulsion).

126. *Id.* at 960 (Brennan, J., concurring).

throughout the United States.”<sup>127</sup> The theme of free labor permeated the early ideology of the Republican Party, and it pervaded debates concerning freedom throughout the Thirty-Ninth Congress as well as the evolving thoughts of Abraham Lincoln.<sup>128</sup> That Congress banned voluntary peonage throughout the land has long been overlooked. That ban through the Peonage Abolition Act of 1867 is particularly significant in terms of congressional power to enforce the Civil War Amendments in the quest for the promise of freedom. That freedom, paradoxically, may require the intervention of others to protect individuals from making free choices that are not and cannot be truly free.

In recent years, judges have struggled to uphold criminal convictions even with horrific fact patterns under the Victims of Trafficking and Violence Protection Act, whose “legislative history suggests that Congress passed this act to correct what they viewed as the Supreme Court’s mistaken holding in *United States v. Kozminski*.”<sup>129</sup> It has apparently remained exceptionally difficult for prosecutors to obtain convictions under the complicated requirements of this and related criminal statutes.<sup>130</sup> Ironically, the bold 1867 guarantee of a basic civil right to be free from coercion, even if a contract was entered voluntarily, remains on the statute books but is virtually forgotten. It could and should afford civil remedies for vulnerable people today who are still victimized by successful attempts “to establish, maintain, or enforce, directly or indirectly, the voluntary or involuntary service or labor of any persons as peons, in liquidation of any debt or obligation, or otherwise.”<sup>131</sup> Rather than becoming

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127. 322 U.S. 4, 17–18 (1944).

128. See Foner, *The Fiery Trial*, supra note 101, at 284–89 (describing Republican debates about how free labor would replace slave labor). See generally Eric Foner, *Free Soil*, supra note 38 (arguing Civil War-era Republicans championed “free labor ideology”).

129. *United States v. Dann*, 652 F.3d 1160, 1169 (9th Cir. 2011). Sitting by designation, District Court Judge Nancy Gertner noted in *Dann* Congress’s concern that modern-day traffickers are “increasingly subtle” and that they often use “nonviolent coercion.” *Id.*; see also *United States v. Sabhnani*, 599 F.3d 215, 241–45 (2d Cir. 2010) (holding evidence was sufficient to “to establish [defendant’s] intent to participate in the crimes of forced labor and peonage” of immigrant live-in housekeepers); *United States v. Calimlim*, 538 F.3d 706, 714–18 (7th Cir. 2008) (holding evidence of abusive treatment of immigrant live-in housekeeper over many years sufficient to sustain conviction and sentence enhancement for forced labor and harboring of alien for financial gain).

130. See, e.g., Ken Kobayashi, *Judge Dismisses Case Against Aloun Farms Owners*, Honolulu Star-Advertiser (Aug. 4, 2011), <http://www.staradvertiser.com/news/breaking/126785073.html?id=126785073> (on file with the *Columbia Law Review*) (last updated Aug. 4, 2011, 10:34 PM) (“A federal judge granted a request by prosecutors this morning to dismiss the forced labor charges and related counts against . . . Aloun Farms.”); *Feds Drop Human-Trafficking Prosecution of Global Horizons*, Honolulu Star-Advertiser (July 20, 2012, 3:36 PM), <http://www.staradvertiser.com/news/breaking/163254156.html?id=163254156> (on file with the *Columbia Law Review*) (noting “federal prosecutors said they are unable to prove their case beyond a reasonable doubt”).

131. 42 U.S.C. § 1994 (2006).

entangled in whether criminal statutes imply a private right of action,<sup>132</sup> for example, § 1994 offers virtually a clean slate as well as its compelling history. Even the restrictive decisions by the Supreme Court that helped to end Reconstruction and to bring about the rise of Jim Crow recognized the broad promise of the Thirteenth Amendment.<sup>133</sup>

### CONCLUSION

Recently there has been fine scholarly work that focuses on the debates over the Thirteenth Amendment and that takes various positions on its intended scope.<sup>134</sup> It is this Essay's claim that in passing the Peonage Abolition Act of 1867 on the same day as the Military Reconstruction Act, the Thirty-Ninth Congress demonstrated its belief that it had broad constitutional authority to guarantee basic civil rights,

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132. Compare, e.g., *Manliguez v. Joseph*, 226 F. Supp. 2d 377, 384 (E.D.N.Y. 2002) (holding private right of action implied by prohibition of involuntary servitude in criminal law, 18 U.S.C. § 1584), with, e.g., *Brooks v. George Cnty., Miss.*, 84 F.3d 157, 169 (5th Cir. 1996) (upholding dismissal of Thirteenth Amendment and other civil rights claims by pretrial detainee who worked as trusty while being held illegally, except for property claim seeking wages for work performed on public property); *Watson v. Graves*, 909 F.2d 1549, 1552 (5th Cir. 1990) (requiring proof of compulsion for civil remedy, noting that "[w]hen the employee has a choice, even though it is a painful one, there is no involuntary servitude"); and *Dolla v. Unicast Co.*, 930 F. Supp. 202, 205 (E.D. Pa. 1996) (declaring critical elements of peonage are indebtedness and compulsion). Recently, in *Velez v. Sanchez*, the Second Circuit strove mightily to allow the victim of blatantly abusive employers to maintain a possible Fair Labor Standards Act claim against them, though Judge Droney's opinion rejected the Alien Tort Act and other possible bases for civil remedies. No. 11-90-cv, 2012 WL 3089376, at \*14 (2d Cir. July 31, 2012).

133. *The Civil Rights Cases*, 109 U.S. 3, 20 (1883) ("By its own unaided force and effect [the Thirteenth Amendment] abolished slavery, and established universal freedom. Still, legislation may be necessary and proper to meet all the various cases and circumstances to be affected by it, and prescribe proper modes of redress for its violation in letter or spirit. And such legislation may be primary and direct in its character, for the amendment is not a mere prohibition of State laws establishing or upholding slavery, but an absolute declaration that slavery or involuntary servitude shall not exist in any part of the United States."); *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 72 (1873) ("Undoubtedly while negro slavery alone was in the mind of the Congress which proposed the thirteenth article, it forbids any other kind of slavery, now or hereafter. If Mexican peonage or the Chinese coolie labor system shall develop slavery of the Mexican or Chinese race within our territory, this amendment may safely be trusted to make it void."). See generally C. Vann Woodward, *The Strange Career of Jim Crow* (1955) (documenting relatively late rise of Jim Crow, primarily in 1880s and 1890s).

134. See, e.g., Jennifer Mason McAward, *Congressional Authority to Interpret the Thirteenth Amendment: A Response to Professor Tsesis*, 71 Md. L. Rev. 60 (2011) (arguing for more limited scope of congressional power under Enforcement Clause); George Rutherglen, *State Action, Private Action, and the Thirteenth Amendment*, 94 Va. L. Rev. 1367 (2008) (arguing that Thirteenth Amendment provided foundation for extending scope of congressional power to private action); Alexander Tsesis, *Congressional Authority to Interpret the Thirteenth Amendment*, 71 Md. L. Rev. 40 (2011) (arguing for broad scope of congressional power under Enforcement Clause, in contrast to Fourteenth Amendment).

including the rights of free labor, throughout the United States. The political and institutional context helps to explain why Congress believed that it could ban voluntary, as well as involuntary, peonage of all sorts. The old federalism had died a bloody death through the years of the Civil War. The men of the Thirty-Ninth Congress wished to assure that when the states that had seceded were reconstructed and readmitted, they would protect the rights of freedpersons and their supporters not only from violence authorized by state and local governments but also from the private depredations that still dominated Southern life in 1867. If and only if that occurred would the federal government recede from its obligation to protect all its citizens.

John Locke maintained that people were willing to relinquish the state of nature to gain protection. Indeed, this might be considered the crux of the Lockean social contract. Yet protection often seems to import paternalism; in addition, people tend to deny that they need protection even when they do. The American belief in self-reliance is deep and wide. During the Civil War, for example, as people in the North debated what to do with the former slaves, Frederick Douglass insisted "[D]o nothing with them. . . . Your *doing* with them is their greatest misfortune."<sup>135</sup> Of course neither Douglass nor Lincoln was fully consistent in his views about the duty of government to protect those in need.<sup>136</sup> In addition, a central theme that weaves throughout recent studies of Reconstruction is that the context for decisions seemed to change rapidly and repeatedly.

By early 1867, Congress believed that the nation faced a crisis. Congressmen anchored their responses to how to reconstruct the South in their growing belief that sweeping federal power was legitimate and necessary, even unto sending in the troops. Disastrously, they believed, the pre-Civil War Constitution had protected the Slave Power. Now federal protection was necessary for those who had been enslaved as well as for their beleaguered allies. They were sure that Section 2 of the Thirteenth Amendment authorized congressional action that explicitly reached beyond Section 1's prohibitions against slavery and involuntary servitude. Congressional authority stretched throughout the entire terri-

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135. 3 *The Life and Writings of Frederick Douglass* 188–89 (Philip S. Foner ed., 1975).

136. President Franklin Delano Roosevelt, for instance, delighted to quote Lincoln's statement that "[t]he legitimate object of government is to do for a community of people whatever they need to have done, but cannot do at all, or cannot so well do, for themselves, in their separate and individual capacities." 3 *Life and Works of Abraham Lincoln* 215 (Marion Mills Miller ed., 1907); see Franklin D. Roosevelt, *Government and Modern Capitalism* (Sept. 30, 1934), in *FDR's Fireside Chats* 53, 62 (Russell D. Buhite & David W. Levy eds., 1992) (quoting Lincoln and noting likeminded belief). Roosevelt continued, "I am not for a return to that definition of liberty under which for many years a free people were being gradually regimented into the service of the privileged few." *Id.*



tory of the United States to all who might find that they had become peons, even if they purportedly had entered peonage voluntarily.

